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SUBJECT: Judges Protest Proposed Constitutional Changes, Call for Institutional Reforms

REF: 09 NAIROBI 2475

[¶1.](#) This is an action request. Please see paragraph 12.

[¶2.](#) Summary: Kenyan judges, long unpopular with citizens due to their status as the public face of the country's backlogged and inefficient justice system, are finding few sympathizers with their concern that provisions in the draft constitution discriminate against them. There are also divisions within the judiciary itself on the constitutional provisions and the best way forward on reform, although there is consensus on the need to streamline and modernize the Kenyan court system, as well as the need to appoint more judges and magistrates and to allocate additional financial resources to the underfunded judicial branch. If judges are not able to convince the Parliamentary Select Committee to cut the offending provisions in the draft constitution, they could join with other interest groups opposed to different elements of the constitution to lobby against it. End summary.

[¶3.](#) Kenya's judges are protesting over provisions in the draft constitution (see 09 Nairobi 2514) that will require all sitting high court and court of appeal judges to resign and either submit to re-vetting pending reappointment, or retire. (Note: The provision does not apply to the more numerous magistrates, who are treated as civil servants and subjects to different terms of employment. End note.) Calling this "discrimination against the judiciary," a number of high court judges are beginning outreach efforts seeking to amend the language in the draft constitution. Justice Fred Ochieng, who joined the bench in 2003 after President Kibaki's first election, is among the outspoken critics of the draft constitution's approach to judicial reform. In a recent meeting with Poloffs, he called the provisions hypocritical, noting that sitting members of parliament (MPs), who were elected by admittedly flawed 2007 elections overseen by a now-discredited and disbanded Electoral Commission of Kenya, will be permitted to serve out their terms under the new constitution.

[¶4.](#) Ochieng also argued that the new provisions conflict with provisions guaranteeing judges life tenure that are contained in both the current and draft constitutions. He added that there is a legal process to remove corrupt or incompetent judges (via petitioning the Chief Justice), and that it is a "dangerous precedent" to use shortcuts instead of the law. Because the draft constitution's provision allows for judges who do not have enough years of service to receive a full pension to take early retirement anyway, Ochieng argued, some bad or corrupt judges will actually be rewarded for incompetence. Ochieng said that judges should be compensated for losing their legitimate expectation of lifetime employment or, if corrupt, sent home empty-handed.

[¶5.](#) Ochieng, who is the current president of the East Africa Magistrates and Judges Association and who chairs the newly-established communications committee within the judiciary, also described the new constitution's approach as "very bad for morale," and noted the probable disruption to Kenya's overburdened court system would be much greater than in 2003, when a number of judges resigned or were forced out, because all the sitting judges

would be subjected to revetting at the same time. Fundamentally, Ochieng and his colleagues felt that revetting was discriminatory, could be manipulated politically to remove activist judges or those who made rulings against influential political or business figures, and was unnecessary given that legal mechanisms already exist to remove judges accused of wrongdoing.

¶6. Poloffs also met with Justice Isaac Lenaola, the current chairman of the Kenya Magistrates and Judges Association. Lenaola, like Ochieng, joined the bench from private practice in 2003 and served as a member of the recently-concluded Judicial Reform Task Force. Lenaola stated that he thought the Committee of Experts (CoE) drafting the constitution should not have reopened the provisions on the judiciary as they were not controversial in the 2005 Bomas and Wako drafts, and that they should have restricted their review to contentious issues only. But since they had gone ahead and done so, Lenaola continued, the CoE should try to address core issues that have caused a loss of public confidence in the judiciary. He added that he did not object to submitting to revetting, but felt it was important that judges be permitted to remain on the bench while undergoing the revetting process. That way, he argued, judges found to be corrupt or incompetent could be sent home without retirement benefits, where allowing early retirement of those who choose not to submit to vetting could have the perverse effect of rewarding the worst judges.

¶7. On the proposed composition of the Judicial Service Commission (JSC), Lenaola said that he felt the Chief Justice should remain as

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a member of the commission, and that the new JSC should be more inclusive, especially of magistrates who are responsible for the bulk of Kenya's civil and criminal caseload. Lenaola endorsed the LSK's proposal that the JSC include representatives from the private sector, LSK itself, and additional magistrates, and also agreed that Francis Muthuara, the influential head of the Civil Service and a close advisor of President Kibaki, should not retain a seat on the JSC as his presence amounts to executive branch interference in the judiciary. Lenaola also recommended the establishment of an internal peer review mechanism, empowered to impose sanctions, to weed out corruption and incompetence in the judiciary. He said there is also a need for a mechanism for enforcement of court rules and discipline low-level court employees like paralegals, clerks, and registry officials, as he thought most corruption (and accompanying negative impact on public opinion) takes place at this level, but it is very difficult under the current system for judges who observe this behavior (for example, demanding extra payments to procure documents) to get the offending civil service employee punished or dismissed.

¶8. Lenaola said that the Supreme Court proposed in the draft constitution would be a welcome addition, but that the failure to clarify the role of the Chief Justice in the draft was a major oversight and needed to be corrected. He noted that it would greatly assist the oversight of the judiciary to both decentralize and delegate administrative powers from the Chief Justice to heads of divisions of the high court, and to provide the Registrar with a professional secretariat. He added (and Ochieng agreed) that the Registrar's office needed a complete overhaul and additional professional staff with skills in accounting, management, human resources, etc. (Note: The current Registrar, who oversees the day-to-day management of the entire judiciary, is a magistrate by profession, and she and her small staff, while well-respected, are overwhelmed and ill-equipped to manage the administrative and budgetary needs of the judiciary. End note.)

¶9. Under the draft constitution, vetting of judges would be conducted by an Interim Judicial Service Commission (IJSC) composed of two retired Kenyan judges, two retired Commonwealth judges, and one magistrate. The IJSC will look at whether judicial candidates have any criminal, civil, or corruption cases filed against them and whether they are competent. This raises concerns for many judges, who have argued that anyone who wants to disqualify a candidate can simply file a civil suit against him, no matter how spurious the claim may be. Given the slow pace of the Kenyan judicial system, it could be months or years before a frivolous

lawsuit would be thrown out. Judges also raised concerns about the requirement in the draft constitution that MPs must approve judicial candidates, arguing that this would compromise judicial independence and integrity and would make judges inappropriately beholden to sitting MPs, perhaps interfering with the ability to make impartial legal judgments against them.

¶10. Ochieng and his colleagues on the communications committee stressed the need to create a more accountable system of work, as the current judicial system is not meeting the public's expectations. They reiterated the need for judicial institutions to be more efficient and better funded. Kenya currently has 66 high court and court of appeal judges and 282 magistrates to serve a population of approximately 38 million people, and lack of courtroom space is preventing the government from filling the three vacancies on the court of appeal and 23 vacancies in the high court.

¶11. Another complaint is that the judiciary does not have independent control over its budget, which is currently managed by the Ministry of Justice. In addition, Ochieng argued, the judiciary's budget for FY 2009 is 1.8 billion Ksh (\$23.8 million), or about 0.2 percent of Kenya's 760 billion (\$10 billion) Ksh budget, while the Parliament's budget is more than 7 billion Ksh (\$92 million). Ochieng noted that in a speech at a recent seminar, the head judge of the ICTR noted that the international standard for effective judicial function is to allocate between 1.5 and three percent of the national budget.

¶12. Action request: Partly due to concern about the provisions in the draft constitution, the judiciary, which has traditionally not been very open to accepting outside guidance, is showing an unprecedented willingness to engage in dialogue with donors and to consider reforms that would improve the overall functioning of the system as well as help to heal the distrust between the public and other stakeholders in the system and the judges and magistrates. Post therefore requests additional resources for the Resident Legal Advisor (RLA) to conduct training and bring in technical experts in areas like court records and systems automation, case management,

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court administration, and judicial ethics. The RLA is already in negotiations with Judge Ann Williams of the Seventh Circuit Court of Appeal to return to Kenya and provide training and advice to senior judicial officials on court administration and oversight, and we would like to build on her engagement by bringing out other technical experts while the judiciary (and the Chief Justice) is ready to institute meaningful reforms. We also reiterate our request in ref A para 5 for an additional Legal Advisor, as the current RLA has numerous responsibilities, including counterterrorism-related training and engagement on piracy prosecutions, that do not leave sufficient time for engagement on judicial reform.

¶13. Comment: Years of refusing to respond publicly to criticism or engage in dialogue with the public and civil society (this attitude is still embodied by Chief Justice Gicheru), coupled with the dismal performance of the Kenyan judicial system, has led to public resentment and hostility towards judges. Despite belated outreach efforts, there is little to no sympathy for the judges' plight even among court stakeholders and organizations like the Law Society of Kenya. However, the judges' high-level political connections may be sufficient to sway the CoE and/or Parliamentary Select Committee into making changes to the draft constitution once it reaches them in early January 2010. If they do not succeed in getting the changes they want (chiefly the removal of the revetting requirement), judges could join with groups opposed to other elements of the draft constitution (for example, Christian groups opposed to the retention of Muslim Khadi's courts) to lobby against passage of the constitution at a national referendum. On the positive side, the judiciary appears more willing than ever before to implement systemic reforms that will improve the efficiency of the entire court system, and we would like to take advantage of this opening as soon as possible given the urgency of restoring public confidence in the impartiality and integrity of the judiciary. End comment.

